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NO. 84-909 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

MUNIGAWAH MUNUSAMY, ET AL.,
Petitioners

v.

McCLELLAND ENGINEERS, ET AL.,
Respondents

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RULE 28.1 LIST OF PARTIES

Petitioners have listed the parties to the case. In addition the following companies should be listed:

McClelland Engineers, Ltd.

McClelland Engineers, Inc.

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To The Honorable Judges Of The Supreme Court Of the United States:

COME NOW McClelland Engineers, Inc., McClelland Engineers, S.A., McClelland Engineers, S.A. BHD., Oceaneering International, Inc., Oceaneering International A.G., Oceaneering International Brunei, Crosbie Offshore Services, Ltd., Arabian American Oil Company, and Global Marine Drilling Company, Respondents, and file this their Opposition to the Petition for Writ of Certiorari filed herein, and would show as follows:

STATEMENT OF THE CASE

The Petitioners are seeking review of an Order entered by the United States Court of Appeals for the Fifth Circuit, wherein the Fifth Circuit denied Respondents' Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas without prejudice, vacated the District Court's prior Order denying certification pursuant to 28 U.S.C. § 1292(b), and requested that the District Court certify its interlocutory Order for appeal. *In Re McClelland Engineers, Inc., et al., Petitioners,* No. 84-2363 (5th Cir. July 20, 1984) (a copy of the Fifth Circuit's Order of July 20, 1984 is attached to Petitioners' Petition for Writ of Certiorari as Appendix 4). The Order of the District Court which was the subject of Respondents' Petition for Writ of Mandamus in the Fifth Circuit, and the subject of the Fifth Circuit's July 20, 1984 Order, involves the District Court's January 30, 1984 denial of Motions to Dismiss three cases pursuant to the doctrine of *forum non conveniens.* That decision is published under the style of *Munusamy v. McClelland Engineers, Inc.,* 579 F.Supp. 149 (E.D. Tex. 1984).

A. Course of Proceedings and Disposition in the Court Below

This case involved three causes of action which were filed separately in the United States District Court for the Eastern District of Texas, Beaumont Division, by foreign plaintiffs, Muigawah Munusamy, Stephen Peter Crow and William Wayne Picco, Petitioners herein, for personal injuries allegedly sustained on three non-traditional vessels

while those vessels were operating in foreign waters.[1] The Defendants in all cases, Respondents herein, filed Motions to Dismiss those cases pursuant to the doctrine of *forum non conveniens*, on the grounds that the cases had no contacts with the United States or with the Eastern District of Texas, that foreign law should be applied to each of the three cases and that each of the three cases should be tried in an appropriate foreign forum.

The District Court consolidated the three cases for purposes of consideration of the Motions to Dismiss. *Munusamy v. McClelland Engineers, Inc.*, 579 F.Supp. 149, 150 (E.D. Tex. 1984). The cases remain consolidated for purposes of appeal in the Fifth Circuit. *Munusamy, et al. v. McClelland Engineers, Inc., et al.*, No. 84-2549 (5th Cir. October 2, 1984). When the District Court denied the Motions to Dismiss, Defendants filed a Motion requesting the District Court to certify its Order for appeal to the Fifth Circuit, pursuant to 28 U.S.C. § 1292(b). The District Court also denied that motion on April 11, 1984, without specifying any reasons for its ruling. Thereafter, Respondents filed their Petition for Writ of Mandamus in the Fifth Circuit, requesting relief

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1. William Wayne Picco filed suit against Global Marine Drilling Company and Crosbie Offshore Services, Ltd., for injuries allegedly sustained while Plaintiff was working onboard the GLOMAR ATLANTIC, which was operating in Canadian waters. C.A. No. B-82-709-CA. Stephen Peter Crow filed suit against Oceaneering International, Inc., Oceaneering International A.G., and Oceaneering International Brunei, for personal injuries allegedly sustained while Plaintiff was working onboard the PACIFIC PROTECTOR, which was in Northwest Borneo waters, offshore Brunei. C.A. No. B-82-143-CA. Muigawah Munusamy filed suit against McClelland Engineers, Inc., McClelland Engineers, S.A., McClelland Engineers, S.A. BHD., and Arabian American Oil Company, for personal injuries allegedly sustained while Plaintiff was working on a drilling rig which was placed on Barge 182, in the Arabian Gulf. C.A. No. B-81-800-CA.

in the alternative as follows: that the Fifth Circuit issue its Writ directing the District Court to vacate its Order of January 30, 1984, and to dismiss the cases for resolution in appropriate foreign forums; that the Fifth Circuit issue its Writ directing the District Court to certify its Order pursuant to Section 1292(b); that the Fifth Circuit retain jurisdiction over the Petition and take other appropriate action. On July 20, 1984 the Fifth Circuit issued the Order of which Petitioners complain in their Petition for Writ of Certiorari. In that Order, the Fifth Circuit vacated the District Court's Order of April 11, 1984, denying certification pursuant to Section 1292(b), and requested that the District Court certify its interlocutory Order of January 30, 1984 for appeal pursuant to Section 1292(b). The Fifth Circuit declined to issue the Writ of Mandamus requested by Respondents.

Thereafter, Respondents filed in the District Court their Motion for Reconsideration of the request for certification, and the District Court granted the request for certification on July 30, 1984, making all of the necessary findings for appeal pursuant to that provision. Thereafter, Respondents timely filed their Application to the Fifth Circuit for appeal pursuant to Section 1292(b), and the Fifth Circuit granted the Application to take interlocutory appeal on October 2, 1984. Petitioners filed their Petition for Writ of Certiorari in the United States Supreme Court on October 17, 1984, and Respondents were granted an extension up to and including January 14, 1985, for the purpose of filing their Opposition thereto.

B. Statement of Facts

The three cases made the basis of the Petition for Writ of Certiorari involve claims by foreign citizen and resident

plaintiffs for injuries allegedly sustained onboard non-traditional vessels essentially permanently assigned to waters offshore of various foreign sovereigns, in connection with petroleum exploration and exploitation activities in those foreign waters. None of the vessels involved is a traditional blue water, cargo carrying vessel. Further, none of the vessels involved was controlled or operated from the United States, or produced revenues for the direct benefit of corporate entities in the United States.[2]

Stephen Peter Crow, a citizen of New Zealand, was employed by a company registered in Brunei, Oceaneering International Brunei (OIB), whose Brunei operations were established specifically and solely for the purpose of implementing a diving services contract in connection with petroleum extraction activity in Northwest Borneo waters. All of the day-to-day operational and management de-

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2. The factual descriptions of each of the three cases which are provided herein are the same as those provided to the Fifth Circuit in Respondents' Petition for Writ of Mandamus. In addition, the Fifth Circuit had before it the Petitioners' Brief in Opposition to the Petition for Writ of Mandamus, portions of which are included as Appendix 8 to the Petition for Writ of Certiorari. As is explained in greater detail hereinbelow, the Fifth Circuit did not need to consider any additional facts in order to render its opinion of July 20, 1984. Moreover, the only facts necessary to the Fifth Circuit's resolution of the issues are stated on Page 2 of that opinion: "all three plaintiffs were foreign nationals and residents; none was a United States citizen. Each was injured or killed on an unconventional vessel engaged in offshore petroleum exploration or production in faraway coastal waters—those off Borneo, Saudi Arabia and Newfoundland. At least two of these vessels concerned apparently flew foreign flags. These circumstances suggest a choice-of-law inquiry applying the *Lauritzen/Rhoditis* factors, as adapted to unconventional vessels by the law announced for this Circuit in Chiazor v. Transworld Drilling Co., Ltd., 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, [455 U.S. 1019] (1982)." In Re McClelland Engineers, Inc., No. 84-2363, at 2 (5th Cir. July 20, 1984) (footnote omitted). Petitioners have not disputed that the foregoing facts are correct.

cisions of OIB were made onboard the vessel PACIFIC PROTECTOR, with supervision from management personnel assigned to and working out of Brunei. OIB is an operational area office of Oceaneering International, Inc. (OII), which is a Delaware corporation with its principal place of business in Houston, Texas; however, none of the decisions regarding the day-to-day operations of the PACIFIC PROTECTOR were made by or required to be authorized by any personnel in Houston. Revenues arising out of the contract between Crow's employer and Brunei Shell Petroleum Company, Ltd., which is part of Royal Dutch Shell, based at The Hague, Netherlands, were paid into a bank account in Brunei, maintained for and under the name of OIB. The PACIFIC PROTECTOR is a Panamanian flagged vessel, owned by a United Kingdom corporation. At the time of Crow's injuries, the PACIFIC PROTECTOR was on long-term charter to Brunei Shell Petroleum Company, Ltd., and was essentially permanently assigned in the South China/Java Sea area off Brunei, to provide diving support, fire fighting, rescue and inspection services for offshore platforms.

Muigawah Munusamy, a Malaysian citizen and a resident of Singapore, was employed by a Panamanian corporation, out of a branch office in Dubai, United Arab Emirates. Munusamy was performing work in the Zuluf Field of the Arabian Gulf, in connection with a contract relating to offshore petroleum exploration and production, which had been executed between two entities based in Saudi Arabia. The revenues generated by that contract were not provided to any United States entity, and all of the day-to-day operations of Munusamy's employer, McClelland Engineers, S.A. (MESA), were directed from Damman, Dubai or Singapore. The contract covered

work to be performed exclusively in Saudi Arabia and its territorial waters. MESA is a Panamanian corporation, and is a wholly owned subsidiary of McClelland Engineers, Ltd., a Delaware corporation. Neither that company nor McClelland Engineers, Inc., had any right of control over, or any involvement in the management, financial personnel and operational decisions which are made by MESA. Munusamy allegedly was injured while doing work on a drilling rig which was owned by MESA and was used in the Arabian Gulf. The barge upon which the drilling rig was placed, and the tug attending the barge, were owned by a Dubai company. The barge was registered in Dubai and flew a Dubai flag, and both the barge and tug were on charter from their owner to MESA for use in the Arabian Gulf for the duration of the petroleum-exploration-related contract.

William Wayne Picco, a citizen of Canada, was employed by a Canadian corporation, Crosbie. Crosbie had a contract with Global to provide Canadian drilling personnel like Picco for Global's operations in Canadian territorial waters. The agreement between Global and Crosbie was entered into in Canada, and controlled by Canadian law. Picco's injury allegedly occurred aboard the drill ship GLOMAR ATLANTIC while that vessel was moored in Canadian waters at Botwood Harbor, Newfoundland, Canada. Picco received all of his medical treatment in Canada. All witnesses to his alleged injury were Canadian citizens. The drilling operations of the GLOMAR ATLANTIC were limited to Canadian territorial waters, as was Picco's employment. No part of the contract between Global and Crosbie was performed outside of Canada. All of the day-to-day operational and management decisions of Global were made onboard the

GLOMAR ATLANTIC and/or at its operational office in Botwood Harbor, Newfoundland, Canada. No management decisions were made by or were required to be authorized by any personnel in the United States. At the time of Picco's alleged injury, the GLOMAR ATLANTIC had essentially been permanently assigned to Canadian territorial waters offshore of the Province of Newfoundland.

ARGUMENT

The Petition for Writ of Certiorari mischaracterizes the Fifth Circuit's Order of July 20, 1984 as a "*de facto*" mandamus, and misconstrues the ruling of the Fifth Circuit in connection with the District Court's denial of the Motions to Dismiss for *forum non conveniens* and the District Court's denial of Respondents' application for certification of that Order to the Fifth Circuit pursuant to Section 1292(b). A review of the Fifth Circuit's Order will demonstrate that the Circuit Court carefully reviewed the January 30, 1984 decision of the District Court, and determined, on the basis of the District Court's erroneous and unprecedented *forum non conveniens* analysis, that the decision denying the Motions to Dismiss was appropriate for appellate review. As described by the Fifth Circuit in its Order of July 20, 1984, the District Court's opinion "rests on novel premises, declines to determine what substantive law is to be applied at trial, and appears to question both the continuing validity of controlling precedent of this Court and that of the Supreme Court, [nevertheless], the trial judge refused to certify his interlocutory order for appeal." *In Re McClelland Engineers, Inc., et al.*, No. 84-2363, at 1-2 (5th Cir. July 20, 1984).

A review of the Circuit Court's opinion will demonstrate that the underlying basis upon which the Court rendered its decision did not involve unnecessary reliance upon intricately developed records in each of the three cases, but was focused upon the District Court's radically different reasoning process in resolving the *forum non conveniens* issues, and its clear departure from the requirement that the District Court must determine what substantive law governs a case as a prerequisite to balancing the convenience factors prescribed by this Court in *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501 (1947). *In Re McClelland Engineers, Inc., supra,* at 2, 3. On that basis, the Fifth Circuit determined that intervention was necessary, that the District Court's refusal to certify the Order for interlocutory appeal was an abuse of discretion, and that the limited intervention of vacating the District Court's Order of April 11, 1984 and of requesting the District Court to certify its Order was absolutely necessary. The Fifth Circuit was clearly correct in concluding that the District Court had disregarded controlling precedent not only in its reasoning but also in reserving the choice-of-law inquiry until the close of the evidence. "In such cases, we must decide what body of law applies, United States or foreign. . . . . *Lauritzen-Rhoditis* tell us that we must decide what . . . law is applicable by looking at eight factors." *De Oliveira v. Delta Marine Drilling Co.,* 707 F.2d 843, 845 (5th Cir.), *rehearing en banc denied,* 715 F.2d 577 (5th Cir. 1983); *Vaz Borralho v. Keydril Co.,* 696 F.2d 379, 384 (5th Cir.), *rehearing en banc denied,* 710 F.2d 207 (5th Cir. 1983). Thus, the choice-of-law analysis clearly constitutes a controlling question of law about which there is substantial ground for difference of opinion and resolution of which materially will ad-

vance the ultimate termination of the litigation. Accordingly, the Fifth Circuit was empowered to vacate the District Court's Order denying certification and to request that the District Court reconsider the Section 1292(b) criteria.

In circumstances where appellate intervention was required, the Fifth Circuit unquestionably had authority pursuant to 28 U.S.C. § 1651 to vacate the District Court's Order of January 30, 1984. *See, e.g., Castanho v. Jackson Marine, Inc.,* 650 F.2d 546 (5th Cir.), *rehearing denied,* 656 F.2d 700 (5th Cir. 1981); *Leasco Data Processing Equipment Corporation v. Maxwell,* 468 F.2d 1326, 1344 (2d Cir. 1972); *Garner v. Wolfinbarger,* 433 F.2d 117, 120 (5th Cir. 1970). The Court, however, declined to exercise that power and decided to intervene to a very limited extent.

Petitioners make essentially three complaints regarding the intervention of the Fifth Circuit: that the action of the Fifth Circuit was in conflict with this Court's decision in *Allied Chemical Corporation v. Daiflon, Inc.,* 449 U.S. 33 (1980); that the decision of the Fifth Circuit is contrary to decisions rendered by other appellate courts; and that, in any event, this case is not appropriate for interlocutory review pursuant to Section 1292(b). Each of Petitioners' contentions is without merit, and cannot be persuasive that this case presents the appropriate circumstances for granting of a Writ of Certiorari. The Fifth Circuit's decision in this matter was entirely appropriate in the circumstances and the Order of July 20, 1984 does not conflict with the decisions of this Court and other Circuit Courts. *See, e.g., Fernandez-Roque v. Smith,* 671 F.2d 426 (11th Cir. 1982). As

fully explained in an earlier decision by the Fifth Circuit, the District Court's incorrect *forum non conveniens* analysis, together with its refusal to certify the question for appellate review, "puts the Appellate Court in the position of either acquiescing in a useless trial and later appeal or the equally dubious position of saying that the trial Court's error is so gross that it amounts to an abuse of discretion." *Tokio Marine & Fire Insurance Co. v. Aetna Casualty & Surety Company,* 322 F.2d 113, 115 (5th Cir. 1963). Notwithstanding Petitioners' mischaracterization of the Fifth Circuit's action as a *"de facto"* mandamus, the Fifth Circuit declined to issue the requested Writ. The Court acted entirely appropriately and ruled correctly within the clear scope of its supervisory powers.

Although Petitioners have attempted to demonstrate to this Court that the Fifth Circuit's action was directly contrary to decisions of this Court and to those of other Circuit Courts, their position cannot be persuasive when examined closely. Respondents submit that none of the requisites for review by Certiorari are met in this case, and request that this Court deny the Petition for Certiorari.

> [I]t is very important that [the United States Supreme Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head.

Layne & Bowler Corporation v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923).

This Court consistently has recognized that a Writ of Mandamus pursuant to 28 U.S.C. § 1651 "is appropriately issued, . . . when there is 'usurpation of judicial power' or a clear abuse of discretion. . . ." *Schlagenhauf v. Holder,* 379 U.S. 104, 110, 13 L.Ed.2d 152, 159 (1964), citing *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383, 98 L.Ed. 106, 112 (1953). Thus, in circumstances where issuance of the writ by the Fifth Circuit in the instant cause would have been appropriate, the Fifth Circuit's much more limited intervention cannot be construed as contrary to the authority of this Court, and its decision clearly is not in conflict either with decisions of this Court or with those of other Appellate Courts. Where the ruling of the District Court, in contrast, disregards controlling precedent of this Court and of the Fifth Circuit, the Circuit Court's limited action to protect its power of supervisory control over the District Court cannot feasibly be characterized as an issue of national importance requiring review by Certiorari.

Thus, Petitioners have failed to satisfy the requirements for review on certiorari, and no reason exists in the circumstances of this case for granting of the Writ by this Court. Respondents respectfully submit that the Petition for Certiorari should be denied in its entirety, and that the proceedings in the Fifth Circuit should be permitted to go forward, so that the issues of the law applicable to these cases and the appropriate forums for resolution of these cases can be determined.

A. There Is No Conflict With The Decisions Of This Court.

Petitioners' primary focus with regard to their contention that the Fifth Circuit's action was in conflict with

decisions rendered by this Court is this Court's decision in *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33, 66 L.Ed.2d 193 (1980). A review of that decision will demonstrate that Petitioners' contentions must be rejected. In *Allied Chemical Corporation,* the District Court had conducted a four week jury trial, and subsequently, by oral order, denied defendants' motion for a judgment notwithstanding the verdict, and granted their motion for new trial. The Tenth Circuit issued a Writ of Mandamus directing the trial court to reinstate the jury verdict on liability, and permitting the trial court to conduct a new trial on the issue of damages. *Id.* at 34.

In granting the Petition for Writ of Certiorari and reversing the Court of Appeals' issuance of the Writ, the Supreme Court noted that the Tenth Circuit had issued the Writ without benefit of review of the trial transcript. Petitioners have stressed the observation of the *Allied Chemical Corporation* Court as being of singular importance in the facts of the instant case, and providing reason enough for this Court to grant Certiorari and to reverse the decision of the Fifth Circuit. In their attempts to convince this Court that the Fifth Circuit erroneously reviewed too few facts, or an incomplete record, the Petitioners overlook two essential considerations. The District Court in this matter was invited to file a memorandum in response to the petition for writ of mandamus. The Memorandum was filed on July 12, 1984, and is reprinted herein as Appendix A. In that Memorandum, the District Court made very clear that all of its considerations for its opinion of January 30, 1984 had been stated in that decision. The entire Memorandum belies Petitioners' contentions that the District Court was not afforded ample opportunity fully to explain its decision

and that the District Court may have relied, in denying the motions to dismiss, on reasons not stated in its opinion of January 30, 1984. The District Court began the Memorandum by stating that, "the court doubts that much can profitably be added to its early memorandum order. . . ." Memorandum, *supra,* at 1. By taking a position not expressed even by the District Court, Petitioners attempt to create a conflict between the Fifth Circuit's ruling in this matter and the concern of the *Allied Chemical Corporation* Court that in rendering an oral order granting new trial, the trial court did not "intend to set forth each and every reason for its order." *Allied Chemical Corporation v. Daiflon, Inc., supra,* at 36 n.3. The same considerations simply do not exist in the context of this case.

The second essential consideration which Petitioners have ignored is that the Fifth Circuit's decision in this matter did not rest upon a necessity fully to review the records in these cases. The decision focused upon the District Court's failure to make a choice-of-law determination pursuant to the governing authority pertaining thereto, as prescribed by this Court in *Lauritzen v. Larsen,* 345 U.S. 571 (1953) and *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306 (1970). The only facts which the Fifth Circuit had to consider for purposes of determining that the District Court's reasoning and analysis were in conflict with controlling precedent were those stated by the Court on Page 2 of its opinion:

> all three plaintiffs were foreign nationals and residents; none was a United States citizen. Each was injured or killed on an unconventional vessel engaged in offshore petroleum exploration or production in faraway coastal waters—those off Borneo, Saudi

> Arabia and Newfoundland. At least two of the vessels concerned apparently flew foreign flags. These circumstances suggest a choice-of-law inquiry applying the *Lauritzen/Rhoditis* factors, as adapted to unconventional vessels by the law announced for this Circuit in Chiazor v. Transworld Drilling Co., Ltd., 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, [455 U.S. 1019] (1982).

In Re McClelland Engineers, Inc., No. 84-2363, at 2-3 (5th Cir. July 20, 1984) (footnote omitted). Accordingly, Petitioners' attempts to persuade this Court that a conflict exists with the ruling in the *Allied Chemical Corporation* case, based upon the Fifth Circuit's not having reviewed the record, are totally without merit and must be rejected. The Fifth Circuit's decision in this case unquestionably was necessitated by the District Court's reasoning and analysis in connection with resolution of the *forum non conveniens* issues. That reasoning "represents a candidly novel and clear departure from [Fifth Circuit] holdings and those of the Supreme Court." *In Re McClelland Engineers, Inc., et al., supra*, at 5.

Further, the *Allied Chemical Corporation* Court observed that, "[t]he authority to grant a new trial, moreover, is confided [sic] almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corporation v. Daiflon, Inc., supra*, at 36. Petitioners assert that the rulings of the District Court similarly were "entirely discretionary". Even so, the *Allied Chemical Corporation* Court did not foreclose mandamus for review of a discretionary order. *Id.* at 36 n.3. In the instant case, however, "the choice of the applicable law is itself a question of law, [which is fully reviewable as is] any other legal decision." *De Oliveira v.*

Delta Marine Drilling Co., 707 F.2d 843, 845 (5th Cir.), *rehearing en banc denied*, 715 F.2d 577 (5th Cir. 1983). Only the District Court's balancing of the convenience factors is a matter of exercise of the District Court's discretion. *Id.* at 845; *see Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983). Moreover, the issue of what substantive law must be applied to a case must be decided as the initial step in any *forum non conveniens* analysis. *See, e.g., Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384 (5th Cir.), *rehearing en banc denied*, 710 F.2d 207 (5th Cir. 1983). Thus, in contrast to the facts of the *Allied Chemical Corporation* decision, the concern of the Fifth Circuit in the instant case was the District Court's disregard of the law regarding choice-of-law issues, and the District Court's novel and unprecedented analysis.

Moreover, Petitioners' contentions to the contrary notwithstanding, the Fifth Circuit in this matter did not issue a Writ of Mandamus, and merely requested that the District Court certify its interlocutory Order for appeal on the basis that the District Court had analyzed the choice-of-law issue in a way radically different from that prescribed by precedent. *In Re McClelland Engineers, Inc., supra*, at 5. Such limited intervention on the part of the Fifth Circuit cannot be compared to issuance of the Writ of Mandamus which concerned the Court in *Allied Chemical Corporation v. Daiflon, Inc., supra*. Additionally, such action clearly was within the Fifth Circuit's authority on the grounds that the District Court's refusal to certify the controlling question of law was a clear abuse of discretion. *Cf. Garner v. Wolfinbarger*, 433 F.2d 117, 120 (5th Cir. 1970) ("This Circuit has recognized the availability of mandamus as a limited means to test the district courts'

discretion in issuing transfer orders."); *Fernandez-Roque v. Smith*, 671 F.2d 426, 432 (11th Cir. 1982) ("The question of subject matter jurisdiction shall then be certified to this Court, pursuant to 28 U.S.C. §§ 1292 (b), upon request by any party." *Id.* at 432). As in *Fernandez-Roque*, the Fifth Circuit in the instant matter took what steps it deemed necessary to require "the district court to undertake the task it [had] deferred." *Id.* at 432 (Tjoflat, J., specially concurring).

Petitioners' contentions that the Fifth Circuit issued a *"de facto"* mandamus, and coerced the District Court, are totally without merit and demonstrate the misstatements which Petitioners deem necessary in order to obtain review by this Court of a decision wholly within the authority of the Fifth Circuit. The District Court engaged in an incorrect analysis in ruling on Respondents' Motions to Dismiss for *forum non conveniens*. The "novel analysis" of the choice-of-law inquiry, and the District Court's deferral of that decision, contrary to controlling precedent, was of legitimate concern to the Fifth Circuit, as part of its "supervisory control of the District Courts . . . [which] is necessary to proper judicial administration in the federal system." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60, 1 L.Ed.2d 290, 299 (1957). The Fifth Circuit previously had specified the standard which would govern mandamus in a *forum non conveniens* case. *Castanho v. Jackson Marine, Inc.*, 650 F.2d 546, 550 (5th Cir. 1981).

The Court in this case acknowledged that intervention by mandamus would be drastic, and determined that the District Court, instead, should be requested to certify its decision for interlocutory appeal. That action clearly is not

in conflict with any United States Supreme Court precedent, and does not constitute a decision contrary to that in *Allied Chemical Corporation v. Daiflon, Inc., supra.* The District Court in this case granted Respondents' Motion for Reconsideration of Certification on July 30, 1984. That action was appropriate in the circumstances of this case where all of the requirements of Section 1292(b) are met. Petitioners' assertion that the decision of the Fifth Circuit in this matter is in conflict with decisions of this Court clearly is without merit and does not constitute grounds for review by Certiorari.

B. The Decision of the Fifth Circuit is Not Contrary to Decisions Rendered by Other Circuit Courts.

Contrary to Petitioners' contentions, the Fifth Circuit in this matter did not issue a Writ of Mandamus, but determined that some intervention was necessary. The cases which Petitioners have cited in an attempt to persuade this Court that the Fifth Circuit rendered an opinion in conflict with various other Circuit Courts simply do not address the issue which was before the Fifth Circuit in the instant case. Where the District Court disregarded controlling precedent governing the choice-of-law decision, relegating factors articulated by this Court to mere examples, and characterizing Fifth Circuit authority as sufficiently obscure to justify any judicial conclusion, the District Court not only erred as a matter of law but also clearly abused his discretion. The District Court made clear that reliance on The Shipowners' Liability Treaty of 1936, 54 Stat. 1693, would supplant the required *Lauritzen/Rhoditis* eight-factor choice-of-law analysis. *Munusamy v. McClelland Engineers, Inc.,* 579 F.Supp. 149, 156, 157 (E.D. Tex. 1984); Memorandum

of District Court, at 2, 4 (July 12, 1984) (Appendix A). In such circumstances, issuance of the writ would have been appropriate. *See Castanho v. Jackson Marine, Inc.*, 650 F.2d 546 (5th Cir. 1981); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). Moreover, the analysis involved in choice-of-law and the requirement that the substantive law to be applied must be determined, constitute a controlling question of law about which there is substantial ground for difference of opinion, the resolution of which materially will advance the ultimate termintaion of the litigation. In refusing to certify the issue for interlocutory appeal, the District Court further compounded the clear abuse of discretion. Whether a trial court can disregard precedent clearly implicates the premise that a writ may issue to "confine the lower court to the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104 (1967), and, therefore, is an issue of significant importance which should be the subject of appellate review. In circumstances where an appellate court has recognized the importance of the issue and has requested that the District Court reconsider certification, and has not issued a Writ of Mandamus, the requirements are not present for review by Certiorari.

A review of the decisions cited by Petitioners as conflicting with the Order of the Fifth Cirruit will demonstrate that no actual conflict exists. In *Green v. Occidental Petroleum Corporation*, 541 F.2d 1335 (9th Cir. 1976) *(per curiam)*, the Ninth Circuit found that the District Court's certification of a class pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure, was improper, and concluded that, "correction can be achieved through mandamus. . . . Judicial efficiency requires that we order the district court to vacate the (b)(1) certification so

that erroneous notice and opt-out procedures are not employed." *Id.* at 1340. In *Arthur Young & Company v. United States District Court,* 549 F.2d 686 (9th Cir.), *cert. denied,* 434 U.S. 829 (1977), the appellate court declined to issue the Writ of Mandamus, just as the Fifth Circuit did in this case, observing as reason therefor that "the petitioners have not demonstrated with certainty that the district judge made a clear and indisputable mistake in certifying the class issues. . . ." *Id.* at 692. The Fifth Circuit in this matter found that Respondents had demonstrated in their Petition for Writ of Mandamus "a substantial likelihood of 'a failure on the part of the district court correctly to construe and apply the relevant factors, or . . . some clear abuse of discretion in the court's decision on the *forum non conveniens* issue.' " *In Re McClelland Engineers, Inc., supra,* at 6. Thus, the Fifth Circuit in this case recognized that mandamus with respect to the *forum non conveniens* analysis of the District Court might be appropriate pursuant to the standard articulated in *Castanho v. Jackson Marine, Inc.,* 650 F.2d 546 (5th Cir. 1981). The Fifth Circuit, however, declined to issue the Writ, determining that less intervention was sufficient.

In *State Board of Education v. Fox,* 620 F.2d 578 (6th Cir. 1980), the Court declined to issue a Writ of Mandamus on the grounds that the Court could "perceive no possibility of our Writ deciding a controlling question of law . . . or materially advancing ultimate termination of that litigation." *Id.* at 581. Similarly, the Court in *In Re Cessna Aircraft Distributorship Anti-Trust Litigation,* 518 F.2d 213 (8th Cir.), *cert. denied,* 423 U.S. 947 (1975), recognized the availability of the remedy of mandamus in circumstances regarding certification of a class action, and declined to issue the writ

where there was "absolutely no showing that the district court abused its judicial power in granting the class action. . . ." *Id.* at 217. The appellate court in *Leasco Data Processing Equipment Corporation v. Maxwell,* 468 F.2d 1326 (2d Cir. 1972), recognized precisely the power which was acknowledged by the Fifth Circuit in the instant matter. Declining to issue a Writ of Mandamus to require the District Court to certify an Order pursuant to Section 1292(b), the Court concluded that "this [decision] does not mean that we could not mandamus the district judge to dimiss the action on the ground of *forum non conveniens. . . .*" *Id.* at 1344. The Third Circuit in *Plum Tree, Inc. v. Stockment,* 488 F.2d 754 (3rd Cir. 1973), declined to issue a Writ of Mandamus to require the District Court to certify an Order granting transfer, and treated the Petition for Writ "as one seeking this court to order the district court to vacate its transfer order, which is the more usual way to proceed in this circumstance." *Id.* at 756. *In Re Maritime Service Corporation,* 515 F.2d 91 (1st Cir. 1975), involved denial of a writ where Petitioner would have benefit of almost immediate entry of a final appealable order. *Id.* at 93. *United States v. 687.30 Acres of Land,* 451 F.2d 667 (8th Cir. 1971), *cert. denied,* 405 U.S. 1026, did not involve a writ and concerned appealability of orders in condemnation cases. These decisions do not suggest that the Fifth Circuit's Order is incorrect. Thus, the conflict which Petitioners have attempted to identify is artificial.

The Fifth Circuit's ruling in this matter clearly was within its supervisory powers and is consistent with actions of other appellate courts within the federal system. The Fifth Circuit acknowledged that it had power to issue a writ directing the District Court to vacate its Order denying

Respondents' motions to dismiss; however, the Court declined to do so, and determined that less significant intervention was all that would be necessary in the circumstances of this case. Such a course of action not only is consistent with the rulings in other circuits but also is one directly suggested by the *Leasco* and the *Plum Tree* Courts, and previously recognized by the Fifth Circuit in its *Castanho* and *Garner* decisions. Moreover, none of these decisions indicates even implicit disapproval of an appellate court's declining to issue a writ of mandamus in circumstances where less drastic intervention will be sufficient. That is precisely what the Fifth Circuit did in this case. Accordingly, Petitioners have failed entirely to demonstrate to this Court that the requisite conflict between Circuits exists which would necessitate review by Certiorari in order to achieve uniformity.

C. Review Of *Forum Non Conveniens* Decisions Is Appropriate Pursuant To Section 1292(b).

Petitioners have raised various objections to the propriety of reviewing the District Court's decision pursuant to Section 1292(b) in the first instance. Their assertions to the contrary notwithstanding, the review of such a decision, which includes as an initial requirement the resolution of what substantive law will be applied to the case, is entirely appropriate on interlocutory appeal. Petitioners have cited to this Court several decisions in which the courts have permitted interlocutory appeal of transfer orders; however, they have omitted a recent and significiant decision rendered in the Fifth Circuit on precisely the issues which are before the Fifth Circuit on appeal of the instant matter. In *De Oliveira v. Delta Marine Drilling Company,* 707 F.2d 843 (5th

Cir.), *rehearing en banc denied,* 715 F.2d 577 (5th Cir. 1983), the District Court had denied defendant's motion to dismiss the suit on the grounds of *forum non conveniens,* and certified the case for appeal pursuant to Section 1292(b). The Fifth Circuit granted the application for interlocutory appeal and reversed the District Court's decisions that American law was applicable to the case and that the cause should be tried in the United States. The entire matter was remanded to the District Court for entry of an order dismissing the cause on the grounds of *forum non conveniens* for resolution in an appropriate foreign forum.

The facts of *De Oliveira* are very similar to the facts in the instant cases, and the record in that case was essentially in the same posture as the records in the instant cases which will be reviewed on appeal by the Fifth Circuit pursuant to Section 1292(b). The records are developed to the full extent of any record which will be available for consideration in a *forum non conveniens* decision based on a motion to dismiss. *See e.g., Piper Aircraft Company v. Reyno,* 454 U.S. 235 (1981). Thus, Petitioners' contention that these cases are not appropriate for appellate review because the records are not fully developed can be summarily rejected. The records in these cases contain more than sufficient facts on which the *forum non conveniens* issues can be resolved. Moreover, the facts which were presented to the Fifth Circuit in consideration of the Petition for Writ of Mandamus were more than sufficient in connection with the Order entered on July 20, 1984. As previously demonstrated, the undisputed facts recited in that Order indicated that the District Court should have utilized the *Lauritzen/Rhoditis* factors, as modified by

the Fifth Circuit's *Chiazor* decision, to determine what substantive law would be applied at trial. *See, e.g., Koke v. Phillips Petroleum Company,* 730 F.2d 211 (5th Cir. 1984); *Phillips v. Amoco Trinidad Oil Company,* 632 F.2d 82 (9th Cir. 1980), *cert. denied,* 451 U.S. 920 (1981); *Chirinos de Alvarez v. Creole Petroleum Corporation,* 613 F.2d 1240 (3rd Cir. 1980).

Petitioners mistakenly contend that the District Court correctly applied the *Lauritzen/Rhoditis* factors and that the District Court was not compelled to determine what substantive law would be applicable to these cases at trial. The Fifth Circuit's Order amply points out the problems with the District Court's *Lauritzen/Rhoditis* analysis, a deficiency in the District Court's opinion of January 30, 1984 which easily can be identified without the benefit of any more facts than were cited in the Fifth Circuit's Order. Moreover, aside from the District Court's misplaced reliance on the Shipowners' Liability Treaty to supplant the eight-factor choice-of-law analysis, the practical problems inherent in the District Court's deferral of choice-of-law are apparent: "we are driven to observe that the parties may experience great confusion in tendering evidence at a time of trial when the dispositive issues —those under the law of Indonesia, or Dubai, or Canada, or the United States—are unknown." *In Re McClelland Engineers, Inc.,* No. 84-2363, at 7 n.3 (5th Cir. July 20, 1984).

Petitioners further demonstrate the weakness of their argument regarding the District Court's choice-of-law analysis by asserting that the District Court's reliance on the Shipowner's Liability (Sick and Injured Seamen) Convention, 54 Stat. 1693, was confined only to one of

the *Lauritzen/Rhoditis* factors, the nationality of the plaintiff. Petitioners thereby attempt to invoke this Court's conclusion in *Platt v. Minnesota Mining & Manufacturing Company,* 376 U.S. 240, 244-45 (1964), that, "[t]he District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer." *Id.* at 244-45. The District Court, however, acknowledged in its Memorandum filed in response to Respondents' Petition for Writ of Mandamus that, "the court could not ignore the unequivocal language of the [Treaty] . . . requiring 'equality of treatment to all seamen. . . .' The court was reluctant to discriminate against these foreign wards of the admiralty on the basis of their foreignness." Memorandum of the District Court, at 2 (July 12, 1984) (Appendix A). As is apparent from the District Court's Order of January 30, 1984, together with his Memorandum in response to the Petition for Writ of Mandamus, the Fifth Circuit correctly discerned the District Court's misapplication of the choice-of-law analysis which is required in *forum non conveniens* cases by his focus on the Treaty as dispositive of the issue. Such candidly novel departure from precedent clearly is an appropriate issue for interlocutory appellate review.

Further, Petitioners assert that appellate review is not appropriate because the choice-of-law issue was not decided by the District Court. Petitioners obviously avoid the essential fact involved in this case, that the District Court was required by controlling precedent in the Fifth Circuit to determine the substantive law which was to be applied, prior to completing its *forum non conveniens* analysis, and clearly prior to the close of the evidence in each of the three cases. *See, e.g., De Oliveira v. Delta Marine Drilling Co., supra,* at 845. To the extent that

it was necessary for consideration by the Fifth Circuit, the District Court in fact rendered a decision regarding choice-of-law, that is, its disregard of controlling precedent combined with its decision not to decide. In requesting the District Court to certify its order for appeal pursuant to Section 1292(b), the Fifth Circuit clearly expressed the errors in the District Court's opinion of January 30, 1984, which render that decision appropriate for appellate review.

In the alternative to asserting that these cases are not ripe for appellate review because of the absence of a choice-of-law decision, Petitioners contend that the choice-of-law determination is in the nature of a summary judgment proceeding and, therefore, clearly is not appropriate for interlocutory appeal, because of disputed fact issues. Contrary to that contention, the Order of the District Court on Respondents' Motions to Dismiss on the ground of *forum non conveniens* clearly is appropriate for appellate review because of the necessity for analysis of the facts pursuant to this Court's decisions in *Lauritzen v. Larsen,* 345 U.S. 571 (1953); *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306 (1970); and *Piper Aircraft Company v. Reyno, supra.* Moreover, the analysis must be guided by the Fifth Circuit's decisions in *Chiazor* and *Koke,* which the District Court expressly declined to do. Precisely because the District Court refused to engage in the balancing process which those decisions prescribe, the Fifth Circuit Court of Appeals must do so, and must ultimately determine on the basis of the facts contained in the records of these cases, which substantive law applies to each of Petitioners' causes of action herein. Thus, no question exists that the interlocutory appellate review of the District Court's decision not only is appropriate but

also is essential to the instant cases. More importantly, the Fifth Circuit's proper consideration of the choice-of-law factors is essential to the entire analysis process which is required by this Court and by the appellate courts in resolution of *forum non conveniens* issues.

CONCLUSION

Respondents submit that the Fifth Circuit's Order of July 20, 1984 was proper in all respects, and clearly was within the power of the Fifth Circuit. Moreover, the necessary elements for writ of certiorari are completely absent in the facts of this case. The Petitioners have attempted to persuade this Court that the Fifth Circuit rendered an opinion directly in conflict with decisions of this Court, and with decisions of other appellate courts. A close examination of the authorities which Petitioners cite reveals the transparency of their contentions. The Fifth Circuit's actions in connection with this matter are entirely consistent with decisions concerning issuance of a writ of mandamus by an appellate court, and with decisions concerning the prescribed procedure which must be followed in analyzing motions to dismiss pursuant to *forum non conveniens*. The Fifth Circuit in this matter made it clear in its Order that, notwithstanding its power to issue a writ of mandamus in these facts, it would decline to do so and provide the District Court an opportunity to certify its order for appellate review pursuant to 28 U.S.C. § 1292(b). No decision rendered by this Court or by any of the appellate courts can be or has been cited which demonstrates that the Fifth Circuit's ruling in this case was improper. Accordingly, Respondents respectfully submit that the Petition for Writ of Certiorari filed herein must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Opposition to Petition for *Writ of Certiorari* upon Benton Musslewhite, Esq, 609 Fannin, Suite 517, Houston, Texas 77002, the attorney for Petitioners herein, by placing the same in the United States Certified Mail, Return Receipt Requested, in a properly addressed package with adequate postage thereon, on this, the 14th day of January, 1985.

OF ROYSTON, RAYZOR, VICKERY
& WILLIAMS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-81-800-CA

MUIGAWAH MUNUSAMY

v.

McCLELLAND ENGINEERS, INC., ET AL

CIVIL ACTION NO. B-82-143-CA

STEVEN PETER CROW

v.

OCEANEERING INTERNATIONAL, INC.

CIVIL ACTION NO. B-82-709-CA

WILLIAM WAYNE PICCO

v.

GLOBAL MARINE DRILLING CO., ET AL

(Filed July 12, 1984)

MEMORANDUM

In response to the invitation of the Court of Appeals for the Fifth Circuit to respond to Defendants' Petition for Writ of Mandamus, the district court offers this brief

memorandum. While the court doubts that much can profitably be added to its early memorandum order (Munusamy v. McClelland Engineers, Inc., 597 F.Supp. 149, (E.D. Tex. 1984)), the court believes some further explanation may be helpful.

Defendants argue that the court erred in declining to make a choice of law before denying their motions to dismiss for *forum non conveniens*. Such would have been the case had the court granted the motions, since a case involving U.S. law generally cannot be dismissed for *forum non conveniens*. Because dismissal is not mandatory simply because foreign law applies, however, the postponement of a choice of law until trial is not significant.

The court deferred the choice of law because the pleadings and briefs of the parties caused the court to find the facts controlling the choice of law to be intertwined with the facts of the cases. As such, they were best left to be developed during trials on the merits.

Moreover, the court could not ignore the unequivocal language of the Shipowners' Liability (Sick and Injured Seamen) Convention, October 24, 1936, 54 Stat. 1693 (the Treaty), requiring "equality of treatment to all seamen [injured on the high seas] irrespective of nationality, domicile, or race." *Id.*, 54 Stat. 1700. The court was reluctant to discriminate against these foreign wards of the admiralty on the basis of their foreigness. Rather than summarily denying them the protection of U.S. law, the court chose the fairer course of first weighing all the evidence.

In considering the interests of foreign sovereigns in the causes, the court thought it axiomatic that even a third

world sovereign would prefer that its citizens enjoy the most favorable treatment available under law, without regard to the forum. Should the foreign laws Defendants seek to apply diminish the recoveries of the seamen, the foreign sovereigns, whether as home states of the seamen or as places of injury, can have little interest in application of their recovery-diminishing laws. The only apparent interest the other nations might have in applying their laws is to protect "their" defendants, i.e., the corporate surrogates created to insulate American owners from the burdens of American law. The interest would be in encouraging use of such devices in the haven states. But that is an interest with which this nation has little concern, the court believes. To the contrary, the interest of the United States in regulating its international maritime enterprises is at least as great. Moreover, that interest can hardly be said to vary with the nationality of the seamen involved. Obviously, the Treaty proscribes such discriminatory treatment.

The convenience factors considered by the court did not weigh more heavily in favor of either Plaintiffs or Defendants. As the court observed, most of the private factors involve only economic concerns. Defendants and Plaintiffs alike can reduce their costs of trial preparation by hiring foreign counsel to depose foreign witnesses, of course. Since Plaintiffs offered to advance the costs of Defendants' travel abroad, however, the Defendants cannot reasonably object to the burden of gathering evidence outside the United States. In sum, the court does not perceive how requiring United States maritime enterprises to defend an admiralty claim in a United States forum can be either oppressive or vexatious.

Were the Plaintiffs citizens of the United States, the reasoning of the Defendants logically would entail the same result they argue for here. Their argument would be equally persuasive in favor of a *forum non conveniens* dismissal. Yet the court perceives no basis in the Gilbert or Reyno decisions to grant the United States enterprises effective immunity from suit by Americans in a United States court for maritime injuries arising overseas. And if dismissal of an American plaintiff's cause of action is suspect, the Treaty requires the same conclusion as to foreign seamen.

The public interests involved are naturally of more concern to the court than to the parties. Understandably, the court is tempted, in light of its crowded docket, to use every legal expedient in disposing of cases. But the court will not yield to the temptation offered by the Defendants if the court must thereby discriminate against foreign wards of the admiralty by denying them "equality of treatment" under law.

For the above reasons and those explained in the previous Memorandum Order, the court properly denied the Defendants' Motions to Dismiss.

SIGNED AND ENTERED this 12th day of July, 1984.

/s/ JOE J. FISHER
United States District Judge